
IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COZZIE MERRILL JONES,

Appellant,

—vs—

FRANK A. EYMAN, Superintendent
of the Arizona State Penitentiary,

Appellee.

NO. 20054

PETITION FOR REHEARING

E. D. "BUD" McBRYDE
Pinal County Attorney
Florence, Arizona

DARRELL F. SMITH
The Attorney General
State of Arizona

LLOYD D. BRUMAGE
Chief Deputy County Attorney
Pinal County
Florence, Arizona

GARY K. NELSON
Assistant Attorney General

Attorneys for Appellee

Brief Received and Filed this

_____ day of _____, 1965

CLERK OF THE U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

TABLE OF CONTENTS

	<i>Page</i>
1. Opinion contains erroneous recitations of fact	2
2. Vagueness and ambiguity of the decision	3, 4
3. Abuse of trial court's discretion in refusing withdrawal of plea	4

TABLE OF CASES

	<i>Page</i>
Machibroda vs. U. S., 368 U. S. 487, 82 S.Ct. 510.....	4
State vs. Jones, 385 P2d 1019, 95 Ariz 4.....	4, 5

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COZZIE MERRILL JONES,

Appellant,

—vs—

FRANK A. EYMAN, Superintendent
of the Arizona State Penitentiary,

Appellee.

NO. 20054

E. D. "BUD" McBRYDE
Pinal County Attorney
Florence, Arizona

DARRELL F. SMITH
The Attorney General
State of Arizona

LLOYD D. BRUMAGE
Chief Deputy County Attorney
Pinal County
Florence, Arizona

GARY K. NELSON
Assistant Attorney General

Attorneys for Appellee

Brief Received and Filed this

_____ day of _____, 1965

CLERK OF THE U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

Appellee herein, FRANK A. EYMAN, Superintendent of the Arizona State Penitentiary, by and through the Attorney General of the State of Arizona, DARRELL F. SMITH, and the County Attorney of Pinal County, State of Arizona, E. D. McBRYDE, respectfully petition this honorable Court to grant a rehearing in the above entitled case, and as grounds therefore, respectfully set forth as follows:

I.

That the corpus of the opinion as rendered by this Court in the above entitled case on November 24, 1965, contains recitations of fact, presumably as predicate for the decision which are not supported by the record, and, in at least one instance, is contradicted by the record. The erroneous assertions of fact are as follows:

(a) ASSERTION — That appellant requested the aid of an attorney at the time a confession was given by him on December 8, 1962, at 4:00 o'clock a.m.

RECORD — The confession referred to is not a part of the record of the above entitled case, nor is reference made to it therein other than through argument of counsel and a brief reference in testimony at the District Court level. There is no indication in the record that a request was made by Jones for an attorney at that time, and as a matter of fact, the only discussion concerning an attorney occurred when appellant indicated that he would rather wait to give a statement until after he had acquired counsel.

(b) ASSERTION — That Jones again requested counsel when he gave a second confession on December 11, 1962.

RECORD — The confession referred to is set forth verbatim in the transcript of the preliminary hearing, pages 109 through 137. No request was made therein for counsel.

(c) ASSERTION — That appellant requested counsel at his preliminary hearing on December 14 and 18, 1962.

RECORD — It is correct to state that appellant complained of lack of counsel at the preliminary hearing; however, at no point in the record did he ever request counsel.

(d) ASSERTION — That appellant had no knowledge of his right to obtain counsel at the Superior Court level.

RECORD — There is nothing in the record indicating that appellant lacked knowledge of the Arizona practice of appointing counsel at the Superior Court level, or that he did not know that it would be possible to have the matter remanded to the Justice of the Peace for a second preliminary hearing after appointment of counsel. The record affirmatively reflects that appellant was aware of his right to have counsel appointed at his arraignment in Superior Court. At page 50, lines 13 through 17 of the preliminary hearing transcript, appellant states in response to a question from the Court:

“Yes, I have had the chance, the opportunity. (To consult with counsel). But I haven’t been able to get any for financial reasons. I understand the Court will — *in Superior Court that they will appoint somebody.*” (Emphasis supplied).

(e) ASSERTION — That the trial judge expressed concern about appellant’s mental condition.

RECORD — The only statements of the trial judge contained in the record were at best ambiguous and were subject to the interpretation that he was inquiring concerning appellant’s physical appearance, rather than his mental condition.

II.

The holding of this Court does not make clear what “circumstances” disclosed by the record led them to conclude that appellant’s constitutional rights were infringed. The State of Arizona, therefore, has no way of determining whether the decision is based upon the circumstances cited previously in the decision, some of which are not borne out by the record, or whether other facts in the case were considered controlling.

III.

In view of the vagueness and ambiguity referred to in No. II. above, counsel for appellee and the State of Arizona are left completely ignorant of (1) what errors of commission or omission are responsible for the Court's conclusion that appellant's Constitutional Rights have been violated, and (2) which of the ten clauses contained in the sixth and fourteenth amendments to the United States Constitution were "offended." Certainly, the State of Arizona is not entitled to a favorable decision as a matter of right; but, it is respectfully submitted that if the State of Arizona, its judiciary, and enforcement officers are to avoid making further errors which might result in the loss of a defendant's constitutional rights, they are then entitled to receive from this Court a clear and definite enunciation of the precise facts and law upon which this Court's ruling is based.

IV.

In spite of the Court's assertion to the contrary, the terms of the alternative to discharge, as set forth in the decision, leads to the inevitable implication that this Court is holding that the trial judge abused his discretion in refusing to allow appellant to withdraw his plea of Guilty. Such a holding would be contrary to the previous decisions of the Court of Appeals for the Ninth Circuit and of the United States Supreme Court. (*Machibroda vs. U.S.*, 368 U.S. 487, 82 S.Ct. 510). This issue presents no federal question and therefore the decision of the State of Arizona is necessarily controlling. (*State vs. Jones*, 385 P.2d 1019, 95 Ariz. 4.)

Finally, may it be submitted into the record before this Court that a perusal of the documents, transcripts and records on file herein would indicate that the entire proceedings with reference to Cozzie Merrill Jones since his incarceration on December 8, 1962, are marked throughout by the fact that all the parties concerned with, or connected to, the case have met their responsibilities with singular dedication of purpose. Two private citizens, when they discovered that a young child was about to be molested,

risked their property and their lives in an effort to apprehend Cozzie Jones. Carl Quast, the victim, met his responsibilities when he avoided violent contact with the defendant in the presence of his (the victim's) mother-in-law, and left his home at gun point, silently, thereby avoiding any risk of injury to the old lady, and also thereby sealing his own doom. Two peace officers arrested the defendant at night under circumstances which make it clear that they treated the defendant politely and with due respect for his rights, even though they had been informed that he was armed and dangerous. William Craig Haus met his responsibilities when he took upon himself the burden of allowing his client to plead Guilty to a capital offense, even though this was done contrary to his best advice. He could very easily have avoided this duty by withdrawing as defendant's counsel, but as is stated elsewhere in the record, if Cozzie Merrill Jones had continued in his determination to plead Guilty, some lawyer, somewhere, sometime, would have been forced to bear the responsibility that Mr. Haus could have avoided. The Superior Court Judge, the Honorable T. J. Mahoney, met his responsibilities when he refused to allow withdrawal of the plea of Guilty at a time when the record indicated no justification whatever for such a withdrawal. His judgment and fidelity to the law of the State of Arizona were vindicated by the five members of the Arizona Supreme Court. (*State vs. Jones*, 385 P.2 1019, 95 Ariz. 4). Judge Muecke of the United States District Court for the District of Arizona met his responsibility in recording a detailed findings of fact and conclusions of law after hearing the testimony involved in the present appeal. If any or all of these people have committed error so grievous that a human being's constitutional rights have been violated, the innocent ones, at least, are entitled to the benefit of a decision from this Court which will meet the responsibility that is borne by all members of the Federal and State Judiciary, to the end that the law applicable to this case shall be made clear and the facts defined.

For the above reasons and grounds, appellee respectfully petitions this honorable Court to grant a rehearing in the above entitled cause, pursuant to the provisions of the rules of the Ninth

Circuit Court of Appeals, Number 23. It is further respectfully suggested that this Court as presently constituted request of the Chief Judge of the United States Court of Appeals, Ninth Circuit, that the rehearing be held en banc.

Respectfully submitted,

DARRELL F. SMITH

Attorney General

State of Arizona

Phoenix, Arizona

By 

Assistant Attorney General

E. D. McBRYDE

Pinal County Attorney

Florence, Arizona

By 

Chief Deputy County Attorney

CERTIFICATE OF COUNSEL FOR APPELLEE

Comes now Lloyd D. Brumage, Chief Deputy County Attorney, Pinal County, State of Arizona, and hereby certifies to the United States Court of Appeals for the Ninth Circuit, that in his judgment, the attached petition for rehearing in the above entitled case is well founded, and further certifies that it is not interposed for delay.

Lloyd D. Brumage

Lloyd D. Brumage
Chief Deputy County Attorney
Pinal County

AFFIDAVIT

Comes now Lloyd D. Brumage, he being first duly sworn upon his oath, deposes and says:

That he is the Chief Deputy County Attorney of the County of Pinal, State of Arizona.

That on the 10 day of December, 1965, at 11:00 A.M. o'clock, he served appellant's counsel with copies of the Motion for Rehearing by deposit of three copies to each attorney, First Class, into the U. S. Mails at the Post Office of the United States, located at Florence, Arizona. The names and addresses of the counsels for the appellant who have been served are:

Mr. Harold Goldman

Attorney at Law

3033 North Central Avenue

Phoenix, Arizona

Mr. W. Edward Morgan

Attorney at Law

45 West Pennington

Tucson, Arizona

Attorneys for the appellant.

Lloyd D. Brumage

Lloyd D. Brumage
Chief Deputy County Attorney
Pinal County

SUBSCRIBED AND SWORN to before me this 10 day of December, 1965

Diane Whitlow

Notary Public

My Commission expires:

November 2, 1969

